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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,

Petitioners,

vs.

EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Third Appellate District

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to the Court of Appeal of the State of California
Third Appellate District

INTRODUCTION

The following response to the Petition for Writ of Certiorari is submitted on behalf of Clarence and Raymond Garibaldi, two of the defendants in the trial and respondents in the appellate court. A portion of the response will refer to matters that this court presumably will not verify unless the writ is granted. Such references are made where the petition for the writ is in factual error.

STATEMENT OF THE CASE

Petitioners' statement of the case is in error in the first paragraph thereof (page 5). The statement is there made that:

> "By reason of Snyder's fraudulent representations Petitioners contended, the probate court erroneously believed that the agreement related in part to property which was properly included in the estate when, in fact, the estate, as a party to the agreement, waived any claim which it might have to said property."

In fact the estate (of Theresa Garibaldi, deceasd 1956) was *not* a party to the referred to agreement (of 1962) and because it was not a party to the agreement made between the heirs (eight Garibaldi children, three of whom are the present petitioners and the other five and the estate the respondents) the agreement did in fact relate to property in which the estate had an interest since probate had not been concluded. In any event the question of whether the probate court properly exercised its jurisdiction is a question of state law and the appellate courts of California have twice held in previous appeals that there was jurisdiction.

The estate attorney was J. Calvert Snyder and it was his testimony that was attacked in the present action as constituting extrinsic fraud in the probate court in 1966. (Proceeding #3677, Amador County.)

At the conclusion of the trial of the present action the trial court made extensive findings of fact (Appendix "A" hereto) in which findings the court concluded that there was no evidence of extrinsic fraud in Probate Proceeeding #3677. (Appendix „A" hereto, Findings of Fact #4, #5 p. 3; #8, #9 p. 4; #13, #15 p. 5; #17 p. 6; #28 p. 9.)

Petitioners' Statement of the Case is again in error in intimating in the second paragraph thereof (page 6) that attorney Snyder was the attorney for Clarence and Raymond Garibaldi at the time and in the action in which the asserted extrinsic fraud took place.

On page 6 of the petition to this court the following appears:

> "The court recognized the fact that J. Calvert Snyder was the attorney for the administratrix and the five Garibaldi respondents."

Reference is then made in the petition to Petitioners' Appendix "A", page viii, lines 19-20.

As will be shown later in this response there is no provision in the California law for an appellate court to "recognize" a finding of fact that was not made in the trial court, and while an appellate court has certain limited fact finding powers they were not exercised here.

In truth as petitioners are well aware neither Mr. Snyder nor any member of his law firm represented either Clarence or Raymond Garibaldi. The two were represented by the present writer, Howard S. Dattan. If the appellate court's statement is to be read that either Snyder or any member of the law firm to which he belonged represented either Clarence or Raymond it is in error, probably occasioned by the voluminous transcript encompassing matters in litigation over the past fifteen years, including several appeals and unsuccessful petitions to the California Supreme Court.

It follows that petitioners' statement on page 7 of their petition that the respondent Garibaldis may have obtained property *through the wrongful conduct of their attorney* is also not true as to respondents Clarence and Raymond Garibaldi.

Even if such wrongful conduct of Mr. Snyder had been shown, which it *was not*, he was not the attorney for Clarence and Raymond.

THE WRIT SHOULD NOT BE ALLOWED

The Supreme Court has stated that the importance of the case rather than the possibility of error is the determining factor in granting or denying certiorari. (Rule 19, Rules of the United States Supreme Court.)

Certainly the present case is important to the eight Garibaldi heirs. The petitioners herein have waged a losing battle for years concerning the construction of a 1962 agreement purporting to settle the dispute between the parties which goes back to the death of their mother in 1956. This battle has been fought up and down the length and breadth of the California judicial system and on its frontiers as well.

Nevertheless the desire to triumph emotionally, financially, or legally or all three, does not make the case unique or of signal importance except to those intimately involved. No novel or significant questions of law are involved nor are the matters presented likely to recur.

A. NO FEDERAL QUESTION IS PRESENTED.

The present petition is based upon an argument that a federal question or questions arose not in the trial court but in the appellate court by the alleged failure of that court to consider and abide by established California law concerning the imputation of the fraud of an agent to his principal.

It already has been remarked that attorney Snyder was not the agent of either Clarence or Raymond Garibaldi, and more will be said of this later.

Regardless of the agency relationship, whether the appellate court followed California law is a California question and not a federal question.

The Constitution provides that federal courts may be given jurisdiction over . . . "cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." (Article III, Section 2)

While the meaning of the phrase "arising under" has not been clearly defined, and may never be, it would appear that this phrase does not include questions arising under the constitutions of the various states.

Certainly no case cited in the petition supports petitioners' argument that since the California Constitution confers a right of appeal an alleged failure of the appellate court to follow state decisional law raises a federal question. Yet this is exactly what petitioners contend.

Petitioners' argument is that since the appellate court did not follow what they believe to be the law of the state they were denied equal protection of the law and deprived of due process. If this argument stands up this court may well anticipate a flood tide of petitions from parties who disagree with appellate decisions.

While it is true that the California Constitution guarantees a right of appeal, there is no guarantee therein that the appellate court will decide in favor of the appealing party.

B. NO FEDERAL QUESTION WAS RAISED IN THE CALIFORNIA COURTS.

It has been held that the timeliness with which the federal question is raised in the state court is critical. Failure to raise the question at the stage of proceedings required by state law will preclude review (*Edelman v. California*, (1953) 3 S.Ct. 293, 344 U.S. 357, 97 L.Ed. 387), unless the state rule permits no fair opportunity to assert the question. (*National Mutual Bldg. Assoc. v. Brahan*, (1904) 24 S.Ct. 532, 193 U.S. 635, 48 L.Ed. 823; *Reece v. Georgia*, (1955) 76 S.Ct. 167, 350 U.S. 85, 100 L.Ed. 77.)

It is not too late to raise a federal question by petition for rehearing to the state appellate court where the decision of that court has unexpectedly given rise to a federal question that the party seeking review has had no previous opportunity to assert and could not fairly have anticipated. (*Missouri ex rel Missouri Ins. Co. v. Gehner*, (1930) 50 S.Ct. 326, 281 U.S. 313, 74 L.Ed. 870; *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, (1930) 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107.)

Petitioners have included their Petition for Rehearing to the appellate court in their petition as Appendix "B". A reading of that petition reveals that no federal question of any sort was raised. Accordingly this constituted a failure to raise the purported federal questions at the appropriate opportunity in the state court.

C. NEITHER ATTORNEY SNYDER NOR ANY MEMBER OF THE LAW FIRM OF MAZZERA, SNYDER AND DeMARTINI WAS THE AGENT OF CLARENCE OR RAYMOND GARIBALDI.

As pointed out in the correction of the facts recited in the petition, attorney Snyder did not represent either Clarence or Raymond Garibaldi in the probate proceeding wherein he is alleged by petitioners to have commited extrinsic fraud. Neither did any member or his law firm represent either of them. Nor was he or any member of his firm the agent for either Clarence or Raymond in any manner.

While it is true the appellate court referred to the law firm of Mazzera, Snyder and DeMartini and its partners as the attorneys for the "defendants," thereby lumping all defendants together this was a recitative error on the part of the court.

Reference to Appendix "A" hereto (the trial court's findings of fact) will reveal that there was no finding of fact in the trial court that the Mazzera, Snyder and DeMartini law firm or any of its partners represented either Clarence or Raymond Garibaldi in the probate action.

The entire thrust of the petition is that Clarence and Raymond Garibaldi (as well as the other Garibaldi heirs) benefited by the wrongful conduct of their attorney Snyder.

There is not the slightest indication in the appellate court's decision that it intended its reference to constitute a finding of fact contrary or supplemental to those findings made by the trial court.

While the appellate courts of California have fact finding power granted to them by Article VI, Section 11 of the California Constitution which reads in its entirety:

> "The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right."

such power is limited in its scope (*Tupman v. Haberkern,* (1929) 208 Cal. 256, 280 Pac. 970).

The *Tupman* case has been followed and cited with approval by many subsequent California courts. (*Isenberg v. Sherman,* (1931) 212 Cal. 454, 461, 298 Pac. 1004, 299 Pac. 528; *Davis v. Chipman,* (1930) 210 Cal. 609, 623, 293 Pac. 40; *Burton v. Los Angeles Ry. Corp.,* (1947) 79 Cal.App.2d 605, 611, 180 Pac.2d 367.)

As remarked in the *Tupman* case referring to the Constitutional provision:

> "... the effect of the ... law is to create and establish an exception to the general rule; that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment *be affirmed or modified and affirmed and the litigation be terminated;* (emphasis added) that when the judgment appealed from must be reversed and a new trial is ordered, . . . findings of fact by the reviewing court become inappropriate and unauthorized. . . ." (208 Cal. 256, 270; 280 Pac. 970.)

Further, California Rules of Court, Appellate Rules, specifies the necessary procedure to invoke the appellate

court's fact finding powers. Even if a request for additional findings is made it will be denied where there is no attempt to comply with Rule 23.

In the present case no such request was made, much less any attempt to comply with Rule 23.

D. THE JUDGMENT OF THE APPELLATE COURT RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Petitioners assert (Petition pp. 9-10) that they were entitled, pursuant to the due process clause of the Federal Constitution to an appellate review of their claim of error on the part of the trial court and ... entitled to have the appellate court rule on the issue of whether there was any substantial evidence in the record to support the trial court's finding that J. Calvert Snyder did not perpetrate any fraud.

They further assert (petition p. 10) that the appellate court did not so rule, but held it unnecessary to decide the issue because there was no showing that the Respondent Garibaldis personally perpetrated any fraud.

In fact the appellate court commenced its discussion of the asserted insufficiency of the evidence in Part II of its opinion(Petitioners' Appendix "A" p. xii). The court there commented that in resolving this issue it was bound by the established (California) rule that all factual matters will be viewed most favorably to the prevailing party and in support of the judgment. (Citing *Nestle v. City of Santa Monica,* (1972) 5 Cal.3d 920, 925.)

The court then proceeded for the next three and one half pages of its decision to analyze attorney Snyder's testimony at the probate proceeding #3677 in Amador County. (Testimony given in 1966.)

Further the appellate court went back in time and reviewed matters occurring from 1963 until the time that Snyder testified in the probate court in 1966. This extensive review was undertaken for the purpose of reviewing the trial court's determination that Snyder's testimony was not extrinsic fraud. In confirming that determination the appellate court examined not only the testimony but the events of the previous years which led up to it.

The appellate court concluded that Snyder had made inconsistent statements to various courts on the intent and meaning of the agreement and commented that his acts and conduct were more than puzzling. (Petitioners' Appendix "A" p. xvi.)

In addition the court commented that the actions of Snyder may or may not constitute fraud upon which an order for *compensatory* damages might rest, but said that it did not impute malice since the record was without evidence that the character of Snyder's conduct was argued to the trial court in that context. (Petitioners' Appendix "A" pp. xvi-xvii.)

The court also stated:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratix in her representative capacity." (Petitioners' Appendix "A" p. xvi.)

> "In the absence of evidence of actionable fraud on the part of the Garibaldi heirs, the distribution of the property was not only proper but was made pursuant to a valid judgment." (Petitioners' Appendix "A" p. xvi.)

> "Actionable fraud by the heirs of Theresa has not been disclosed by the evidence presented." (Petitioners' Appendix "A" p. xvi.)

> "We additionally find a total absence of fraud on the part of the heirs upon which a constructive trust could be predicated. . . ." (Petitioners' Appendix "A" p. xvii.)

And finally:

> "On two prior occasions this court has concluded that notwithstanding Snyder's inconsistent actions, verbal and otherwise, relating to the agreement, it was in fact intended by the parties to be a consent to distribution." (Petitioners' Appendix "A" p. xvi.)

Since the court concluded that the agreement was in fact intended to be an agreement of distribution, Snyder's testimony to that effect was truthful, and could not constitute fraud of any sort.

It is submitted therefore that the appellate court fully considered the agreements of petitioners and resolved the case upon the basis of California law, and acted within the ordinary confines of appellate review as set forth in California.

> "In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account,

as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court to be resolved in favor of the finding." (*Bancroft-Whitney v. McHugh*, (1913) 166 Cal. 140, 142, 134 Pac. 1157.) See also *Estate of Teel*, (1944) 25 Cal.2d 520, 527, 154 Pac.2d 384.

> "Of course all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel*, (1944) 25 Cal.2d 520, 527, 154 Pac.2d 384.)

Nowhere in their petition do petitioners appear to recognize that under California law they had the burden of proof and that their evidence in order to prove extrinsic fraud must be clear and convincing.

> "In an action to establish a constructive trust in real property, plaintiff has the burden of proving the allegations of his complaint by clear and convincing proof. (*Dagdagian v. Dagdagian*, (1956) 139 Cal.App.2d 721, 249 Pac.2d 507.) See also *Fowler v. Fowler*, (1964) 227 Cal.App.2d 741.

In asking this court to issue a writ of certiorari not only are petitioners seeking relief beyond the jurisdiction of the court but they ignore the fact that even if Snyder's testimony as to the nature of the agreement was in error it would then simply be an erroneous interpretation or belief. Under California law, even if testimony is perjury it is not extrinsic fraud. *Pico v. Cohen*, (1891) 91 Cal. 29; *Adams v. Martin*, (1935) 3 Cal.2d 246.

> "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of those issues presented to the court for a determination. . . ." (*Gale v. Witt*, (1948) 31 Cal.2d 362, 188 Pac.2d 755.)

The classic statement pertaining to extrinsic fraud is contained in the case of *United States v. Throckmorton*, ( ) 98 U.S. 61, 65, 25 L.Ed. 93:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by an opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side; these, and similar cases which show that there has never been a real

> contest in the trial or hearing of the case, are reasons for which a suit may be sustained, to set aside and annul the former judgment or decree, and open the case for a new and fair hearing . . . In all these cases and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the parties seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

The trial court found that plaintiffs (here petitioners) had and were given, a full and fair opportunity to be heard and present their case. (Appendix "A" hereto, Finding of Fact #4, p. 3)

Further the court found that the petitioners received due process of law throughout such proceedings. (Appendix "A" hereto, Finding of Fact #5, p. 3)

CONCLUSION

Accordingly for all of the reasons given herein it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD S. DATTAN

Counsel for Respondents
Clarence Garibaldi and
Raymond Garibaldi

APPENDIX

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Raymond Garibaldi

SUPERIOR COURT OF CALIFORNIA, COUNTY OF AMADOR

-oOo-

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI, Plaintiffs, vs. EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al., Defendants.	NO. 7767 (Third & Fourth Causes of Action) CONSOLIDATED FINDINGS OF FACT AND CONCLU-SIONS OF LAW
HENRY J. GARIBALDI, EDITH CANVIN, ELVIRA LEVAGGI, RAYMOND GARIBALDI, CLARENCE GARIBALDI, Plaintiffs, vs. SAMUEL D. ROBINSON, et al., Defendants.	No. 8468 (Complaint in Intervention)
JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI, Interveners.	

-oOo-

The above-entitled consolidated causes came on regularly for trial of the Third and Fourth Causes of Action of the Second Amended Complaint in Action #7767 and the Complaint in Intervention in Action #8468 before the above-entitled Court, Honorable Judge John B. Neblett presiding, on May 5, 1975, without a jury, VARGAS, BARTLETT & DIXON, by JOHN C. BARTLETT and JAMES S. BEASLEY, appearing as attorneys for plaintiffs in #7767 and Intervenors in #8468, such parties hereinafter referred to as plaintiffs, and MAZZERA, SNYDER & DE MARTINI, A Professional Corporation, by WILLIAM J. MAZZERA and DAVID WM. BAIRD appearing as attorneys for all defendants in #7767, except Raymond Garibaldi and Clarence Garibaldi, and all plaintiffs in #8468, except Raymond Garibaldi and Clarence Garibaldi, such parties hereinafter referred to as defendants, HOWARD S. DATTAN appearing as attorney for Raymond Garibaldi and Clarence Garibaldi, such parties also hereinafter referred to as defendants. Witnesses were sworn and examined, documentary evidence was introduced on behalf of the respective parties, and the evidence being closed, the cause was submitted to the Court for decision. The Court having rendered its decision in favor of defendants and against plaintiffs, Joseph Garibaldi, Leo S. Garibaldi and Leona D. Garibaldi as to the Third and Fourth Causes of Action of the Second Amended Complaint in Action #7767 and against Intervenors, Joseph Garibaldi, Leo S. Garibaldi and Leona D. Garibaldi, on the Complaint in Intervention in Action #6468, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The defendants did not conceal, willfully, intentionally or otherwise, from the plaintiffs or the Court in Amador County Probate #3677 the fact that a consent judgment based upon the validity and conclusiveness of the

judgment entered in Amador County Action #6071 had been obtained in the United States Tax Court with regard to taxes due in the Estate of Theresa Garibaldi, Deceased.

2. The defendants did not conceal, willfully, intentionally or otherwise, from plaintiffs or the Court in Amador County Probate #3677 the fact that defendants had commenced Amador County Action #7192 for specific performance of the Memorandum of Agreement dated October 22, 1962.

3. Prior to June 9, 1966, plaintiffs and their attorneys knew or should have known of the filing of Amador County Action #7192 and the existence of the consent judgment in the United States Tax Court matter of the Estate of Theresa Garibaldi, Deceased.

4. Plaintiffs had, and were given, a full and fair opportunity to be heard and present their case in the hearings on defendant Edith Canvin's Petition for Instructions as Executrix in Amador Probate #3677, and likewise, on plaintiffs' Petition for Determination of Entitlement to Distribution of Estate in the same probate proceeding during the months of June and July, 1966.

5. Plaintiffs have received due process of law throughout the proceedings in Amador County Probate #3677.

6. Prior to June 9, 1966, plaintiffs had knowledge of all of the proceedings, orders, judgments, opinions, pleadings, and motions in Amador County Action #6071.

7. Prior to June 9, 1966, plaintiffs had knowledge of all of the proceedings, orders, judgments, opinions, pleadings and motions filed in the United States Tax Court with regard to the Estate of Theresa Garibaldi, Deceased.

8. None of the defendants in Action 7767, consolidated herein, and none of their attorneys committed any act of concealment, misrepresentation, fraud, deceit or breach of trust on plaintiffs or on the Court in Amador County Probate #3677.

9. Since the death of their mother, THERESA GARIBALDI, in 1957, and in all proceedings relating to her said estate before the above-entitled Court in proceeding #3677, plaintiffs were represented by counsel of their own choosing.

10. Parties plaintiffs and parties defendants in Action #7767 and parties plaintiff and parties intervenors in the Complaint in Intervention in Action #8468 are identical to the parties before the above-entitled Court in Probate proceeding #3677, except for defendants MAZZERA, SNYDER & DE MARTINI, a partnership and its individual partners, who are bound by those prior judgments, orders and decrees by reason of being assignees of CLARENCE GARIBALDI, one of the defendants in this matter and a party bound by those prior judgments, orders and decrees.

11. Parties plaintiff and parties defendant in Action #7767 and parties plaintiff and parties intervenors in the Complaint in Intervention in Action #8468 are identical to the parties before the Court in Action #18717, Superior Court, County of El Dorado, except for defendants MAZZERA, SNYDER & DE MARTINI, a partnership and its individual partners, who are bound by that prior judgment by reason of being assignees of CLARENCE GARIBALDI, one of the defendants in this matter and a party bound by that prior judgment.

12. Plaintiffs were personally present and/or represented in all proceedings regularly docketed, calendared, duly noticed and held in open Court before the above-entitled Court in *Canvin, et al., vs. Garibaldi, et al.,* Action #6071.

13. Plaintiffs were personally present and/or represented in all proceedings regularly docketed, calendared, duly noticed and held in open Court before the above-entitled Court in the *Estate of Theresa Garibaldi,* Probate #3677, leading to the two orders and decrees entered therein, the first dated January 5, 1967, and the second dated May 29, 1969, (presented for signing June 5, 1969) concerning which appeals were taken from said judgments and decided by the Third District Court of Appeals in 3 Civil 11731 and in 3 Civil 12727.

14. Plaintiffs were represented by counsel of their own choosing in all proceedings had before the Superior Court of the State of California, County of El Dorado, in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

15. The issue of the sufficiency of the notices of hearings in Probate #3677 was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 as affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Suprior Court of the State of California, in and for the County of El Dorado, in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717. Those prior judgments, orders and decrees are long since final.

16. The issue of jurisdiction of the Court in Probate proceeding #3677 over the parties and the real property described in Plaintifffs' Second Amended Complaint was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727, and by the judgment of the Superior Curt of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717. Those prior judgments, orders and decrees are long since final.

17. The issue of the rendering unto plaintiffs of due process in Probate #3677 was fully and finally considered and

determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the county of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

18. The issue of alleged estoppel of defendants in Probate #3677 as asserted by plaintiffs was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

19. The issue of laches and the Statute of Limitations as to the defendants in Probate #3677 was fully and finally considered and determined by the above-entitled Court in Probate #3677 and by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court of the State of California, in and for the County of El Dorado in *Garibaldi, et al., vs. Canvin, et al.,* Action #18717.

20. The Superior Court of Amador County, by its said orders and decrees in Probate #3677, affirmed by District Court of Appeals in 3 Civil 11731 and in 3 Civil 12727, found and determined that there was a settlement and consent to distribution agreement and a supplemental agreement; that is, the Memorandum Agreement and the Supplemental Agreement, Exhibits "A" and "B" to plaintiffs' Second Amended Complaint in Action #7767, and those orders and decrees are now final and conclusive.

21. The District Court of Appeals in 3 Civil 12727 at Page 5 determined that "The heirs had intended the 1962 agreement (the Memorandum Agreement dated October, 1962, Exhibit "A" to plaintiffs' Second Amended Complaint) to govern the division and distribution of all the real and personal properties

irrespective of the judgment in Action #6071 and irrespective of what assets were included or excluded from the estate by that judgment." That judgment is final and conclusive.

22. The validity and effect of the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by the said orders and decrees of the above-entitled Court, in Probate #3677, and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

23. The intention of the parties as to the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

24. The circumstances under which the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was made were fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

25. The issue of performance or claimed lack of performance of the Memorandum Agreement, Exhibit "A" of plaintiffs' Second Amended Complaint in Action #7767 was

fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

26. The issue of alleged abandonment or lack of abandonment of the Memorandum Agreement, Exhibit "A" to plaintiffs' Second Amended Complaint in Action #7767 was fully and finally considered and determined by said orders and decrees of the above'entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court in El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

27. The terms of the Memorandum Agreement, Exhibit "A" to plaintiffs' Second Amended Complaint, was fully and finally considered and determined by said orders and decrees of the above-entitled Court in Probate #3677 and which said orders and decrees were affirmed by the Court of Appeals in 3 Civil 11731 and in 3 Civil 12727 and by the judgment of the Superior Court, El Dorado County, California, in Action #18717. Those prior judgments, orders and decrees are long since final.

28. Plaintiffs invoked, and were subject to, the jurisdiction of the above-entitled Court in Probate Action #3677 by the filing by plaintiffs of a verified petition under Probate Code 1080 pleading that a dispute existed between the heirs of Theresa Garibaldi, the parties hereto, as to the distribution of the Estate of Theresa Garibaldi and requesting that the Court order that the assets of the Estate of Theresa Garibaldi be distributed under the terms of the judgment in Action #6071, by

participating in that action, and by asserting various positions in said proceedings contrary to that taken by the Administratrix of said estate.

CONCLUSIONS OF LAW

1. None of the defendants and none of their attorneys did any act or made any representation whatever to plaintiffs, during the times claimed by plaintiffs, in their Second Amended Complaint and their Complaint in Intervention or at any other time, which would constitute any type of fraud, extrinsic or otherwise.

2. None of the defendants and none of their attorneys did any act or made any representation whatsoever to the Court in Amador County Action #6071 or to the Court in Amador County Probate #3677 or to the Court in El Dorado County Action #18717, during the times claimed by plaintiffs, in their Second Amended Complaint and their Complaint in Intervention or at any other time, which would constitute any type of fraud, extrinsic or otherwise.

3. Any controversy or dispute between the parties in the above-entitled action, as to whether the right, title and interest of the parties in the real property described in plaintiffs' Second Amended Complaint and their Complaint in Intervention and their duties in respect thereto is governed by the judgment made by the above-entitled Court in Action #6071 or is governed by orders and decrees made by the above-entitled Court in Probate #3677, was fully, fairly, finally and conclusively considered and determined by the said orders and decrees of the above-entitled Court in Probate #3677 as affirmed by the Third District Court of Appeal in 3 Civil 11731 and 3 Civil 12727; and all of said judgments, orders and decrees are conclusive barring the causes of action in plaintiffs' Second Amended Complaint and in their Complaint in Intervention

under the Doctrine of Res Judicata as to rights of all of the parties hereto in and to the said real property.

4. Any controversy or dispute between the parties in the above-entitled action, as to whether the right, title and interest of the parties in the real property described in plaintiffs' Seond Amended Complaint and their Complaint in Intervention and their duties in respect thereto is governed by the judgment made by the above-entitled Court in Action #6071 or is governed by the orders and decrees made by the above-entitled Court in Probate #3677, was fully, fairly, finally and conclusively considered and determined by the judgment of the Superior Court of the State of California in and for El Dorado County, Action #18717, and said judgment is now final and conclusive barring the causes of action in plaintiffs' Second Amended Complaint and their Complaint in Intervention under the Doctrine of Res Judicata as to rights of all of the parties hereto in and to the said real property.

5. The claim for relief sought by plaintiffs in their Third Cause of Action is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

6. The claim for relief sought by plaintiffs in their Fourth Cause of Action is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

7. The claim for relief sought by plaintiffs in their Complaint in Intervention is barred by the Doctrine of Res Judicata in that all of the issues raised therein have been finally and conclusively determined and resolved by the above-entitled Court in Probate #3677 as affirmed by the District Court of Appeals in 3 Civil 11731 and 3 Civil 12727 as well as by the judgment of the Superior Court of El Dorado County, State of California, Action #18717.

8. The Superior Court, El Dorado County, California, in its judgment in Action #18717 quieted title in the defendants and against plaintiffs to the real property (Mountain Ranch) described in plaintiffs' Second Amended Complaint and their Complaint in Intervention, the subject of this action. That judgment is now final and conclusive, and the causes of action alleged in plaintiffs' Second Amended Complaint and their Complaint in Intervention are barred thereby under the Doctrine of Res Judicata.

9. Said orders and decrees of the above-entitled Court in Probate #3677, having been affirmed on appeal by the Third District Court of Appeal, 3 Civil 11731 and 3 Civil 12727, are now final and conclusive. Said orders and decrees determined the same issues and facts set out in the causes of action in plaintiffs' Second Amended Complaint and their Complaint in Intervention and bar each of the causes of action alleged therein under the Doctrine of Res Judicata.

Plaintiffs take nothing by way of their Second Amended Complaint and Complaint in Intervention.

Let judgment be entered accordingly.

DATED: October 1, 1975

/s/ John Neblett

Judge of the Superior Court